(2)

No. 09-120

IN THE
SUPREME COURT OF THE UNITED STATES

T.G., MOTHER

Petitioner,

versus

COMMONWEALTH OF KENTUCKY, CABINET FOR HEALTH AND FAMILY SERVICES

Respondent.

On Petition For Writ Of Certiorari
To The Kentucky Supreme Court

PETITION FOR REHEARING

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QUESTIONS PRESENTED

1. Whether KRS 625.090(1)(a), on its face, violates the United States Constitution as interpreted in *Santosky v. Kramer*, 102 S. Ct. 1399 (1982).

2. Whether KRS 625.090(1)(a), as applied by the Jefferson Family Court, violates the United States Constitution as interpreted in *Santosky v. Kramer*, 102 S. Ct. 1399 (1982).

3. Whether the Commonwealth failed to offer any substantial evidence of child abuse or neglect at the termination trial, failed to prove same by clear and convincing evidence, and thereby committed clear and reversible error.

IN THE SUPREME COURT OF THE UNITED STATES
October Term 2008
No. 09-120

T.G. Mother, Petitioner,
v.
Commonwealth of Kentucky, Cabinet for Health and Family Services, Respondent

PETITION FOR REHEARING

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

T.G., Mother, the Petitioner, prays that this Court's Order denying her Petition for Writ of Certiorari be set aside and a rehearing of same granted.

OPINION BELOW

The judgment of the Kentucky Supreme Court was entered on February 19, 2008.

JURISDICTION

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1257(i).

PARTIES

T.G., Mother, Petitioner.

Commonwealth of Kentucky, Cabinet for Health and Family Services, Respondents.

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STATUTE INVOLVED

K.R.S. 625.090., *see*, Appendix A.

STATEMENT OF THE CASE

Procedural history.

This action arises out of a Petition filed on or about April 8, 2005 by the Commonwealth of Kentucky, Cabinet for Health and Family Services (hereafter "the Cabinet" or "Respondent") against T.G. (hereafter "T.G." or "Petitioner"), action # 2006-CA-001008, Jefferson Family Court, *T.G., Mother v. Commonwealth of Kentucky, Cabinet for Health and Family Services; A.J.M., an Infant* (hereafter "the Jefferson Family Court action"). Following a bench trial on December 20, 2005, the Jefferson Family Court entered an Order on March 14, 2006, finding that A.J.M. was an abused or neglected child as defined in KRS 600.020(1), and that it was in A.J.M.'s best interest that T.G.'s parental rights be involuntarily terminated.

T.G. appealed that judgment to the Kentucky Court of Appeals which, by an Opinion rendered on May 18, 2007, reversed the holding of the trial court. The Cabinet then appealed to the Kentucky Supreme Court which, on August 21, 2008 reversed the holding of the Kentucky Court of Appeals and reinstated the Order of the trial court.

T.G. then petitioned this Court for a Writ of Certiorari to review the said Judgment. That Petition was denied by Order of this Court

REASONS FOR GRANTING THE PETITION

1. KRS 625.090(1)(a)(1) is unconstitutional.

Respectfully, Petitioner insists that KRS 625.090(1)(a)(1) is unconstitutional both on its face and as applied by the trial court, because it circumvents the requirement that all facts must be found by "clear and convincing evidence," and allows the trial court to adopt findings from the dependency adjudication of "abuse and neglect", the "threshold" issue, which only requires proof under the lower "preponderance of the evidence" standard.

The position of the Commonwealth, as set out at page fourteen of the brief which it filed in the Kentucky Court of Appeals is as follows:

> Assuming arguendo that this dependency adjudication was the sole basis for a finding of abuse or neglect herein, a finding under K.R.S. 625.090(1)(a)(1) alone would not have violated due process.

The Commonwealth's position appears to be that once a child has been adjudicated dependent, abused, or neglected under the lower "preponderance of evidence standard in a prior dependency adjudication, the only evidence needed to meet the required threshold of proof in a subsequent termination trial - that the child is

actually, factually, neglected or abused - is entry of the prior adjudication judgment into the record, with nothing more.

Such is, of course, exactly what the aforesaid subsection provides, and is the reason why that subsection violates the United States Constitution. Such is manifestly the case.

It is, for example, akin to stating that the Commonwealth could bring a civil action for murder against a defendant, obtain a judgment by preponderance of the evidence, and then solely upon the civil judgment with no additional proof, bring criminal charges, enter a certified copy of the civil judgment, and obtain a criminal conviction "beyond a reasonable doubt," or at least could do so if the Kentucky General Assembly enacted a statute so providing.

At the termination trial, there were no opening or closing statements, and therefore the Commonwealth's approach to "evidence of abuse or neglect" (which consisted primarily of evidence of a dirty home), and its failure to offer evidence of that (supposed) "neglect" at the trial itself, could not be brought to the court's attention.

It is clear, from the Commonwealth's arguments in the court below, that it maintained that entry of a certified copy of a dependency adjudication alone could provide an adequate basis for proving by "clear and convincing" evidence that the child was abused or neglected.

The record of that trial shows that only one witness, Sky Tange, testified concerning "abuse and neglect." As the record demonstrates, her testimony

was cursory, at best, and did not establish by clear, convincing and substantial evidence that TG's child was abused or neglected.

Petitioner maintains that the trial court committed clear error by making findings that the child was abused or neglected when such fact had not been proven in the termination trial itself. The only actual "evidence" placed in the record upon the threshold issue was a certified copy of the dependency judgment.

That judgment, however, had been adduced at the lower preponderance of evidence standard, and the evidentiary findings cannot be substituted for the clear and convincing findings required in a termination trial.

Indeed, the aforementioned Brief of the Commonwealth tacitly concedes that no substantial evidence of abuse and neglect was proven at the termination trial. The Commonwealth was, consequently, left with no option except re-characterizing the testimony of its expert witnesses.

The expert testimony offered by the Commonwealth at the termination trial was not offered to support the threshold finding, but was offered to support post-threshold findings. On appeal, however, the Commonwealth tacitly conceded that no evidence of abuse of neglect had been adduced at the termination trial, in support of the threshold finding. The only (supposed) evidence was offered to support post-threshold findings. Consequently, on appeal the Commonwealth was forced to re-characterize the expert testimony as supporting the threshold finding

of abuse or neglect.

The attempt is was and is nonavailing, since the only "abuse of neglect" alleged were the dirty home and the batting cage incident, and none of the experts testified about either of these topics.

In fact, the expert witnesses called by the Commonwealth only offered testimony concerning the Petitioner's mental state. None of them made any attempt to show that the Petitioner's mental state had any connection to the supposed "abuse of neglect." The expert testimony was not elicited to support a finding that the child had been abused or neglected.

The Commonwealth, rather, assumed that the certified copy of the judgment was, standing alone, adequate proof of the threshold issue. It therefore elicited the evidence for post-threshold inquiries, including the ten factors set out in KRS 625.090(2).

All of the psychological testimony elicited by the State was offered to prove post-threshold issues. The Commonwealth, obviously, did so because it believed that it had satisfied its burden of proof on the threshold issue by filing a certified copy of the judgment. The trial court sustained this position and t hereby committed reversible error.

The controlling legal precedent, *Santosky v. Kramer*, 455 U.S. 745 (1982), requires that abuse or neglect, actual, factual "evidence" of abuse or neglect, be proven in a termination trial, and that findings be made upon "clear and convincing" evidence.

Both the Commonwealth and the statute state that actual, factual "evidence" of abuse or

neglect need not be proven at all in the termination trial, so long as what is proven is a prior adjudication of neglect or abuse at the lower "preponderance of evidence" standard.

The Commonwealth evidently maintains that the Kentucky General Assembly has succeeded in evading the due process requirements of the United States Constitution. The Commonwealth mischaracterizes the intention of the General Assembly. That body, rather, made a good faith effort to comply with the requirements set out in *Santosky*, but used language which the Commonwealth has now taken advantage of in order to justify the seizing of its citizens' children with absolutely no proof of neglect or abuse by clear and convincing evidence, or any evidence at all.

It is a construction of the statutory language which potentially has an adverse effect upon every parent and child in the Commonwealth.

2. The "independent review" mechanism provided for by the Kentucky Court of Appeals violates due process.

The Kentucky Court of Appeals correctly found that KRS 625.090(1)(A) was applied unconstitutionally by the trial court, but declined to go further and declare the statute violated the United States Constitution on its face. It then created the "independent review" mechanism which is found at pages 14-15 of its Opinion Reversing.

The Kentucky Supreme Court declined to address the constitutionality of this mechanism,

holding that the question was not properly before it - therefore apparently leaving in place the mechanism crafted by the Kentucky Court of Appeals.

The "independent review" mechanism was created by the Court of Appeals in an attempt to illustrate how the statute could be applied constitutionally. Petitioner submits that the scheme is, in practical terms, unworkable. Moreover, on legal grounds, it creates an exception to the hearsay rule of such a nature as to violate procedural due process.

The question raised by the "independent review" mechanism envisioned by the Court of Appeals is whether evidence received at a prior adjudication of dependency can be used by the trial court in a subsequent termination trial.

The Court of Appeals concluded that all evidence in the dependency adjudication may be introduced in the termination trial, and the trial court can conduct an "independent review " of whether the evidence supports a finding of dependency by clear and convincing evidence.

Petitioner submits that such evidence may be admissible in the subsequent termination trial, or it may not be. The determination must be made on a case-by-case basis, upon some finding that a hearsay exception applies. Otherwise, the out-of-court statements introduced in the dependency adjudication could be offered for their truth, on a wholesale basis, at the termination trial.

Such evidence will, in many cases, meet an exception to the hearsay rule and might then be

used as the Court of Appeals envisioned. That determination must, however, be made on a case-by-case basis with an exception found for each admission, rather than permitting the wholesale importation of evidence from one adjudication involving other issues and a different standard of evidentiary review into a subsequent termination trial.

The actual evidence of dependency must be proven in the termination trial itself, and that requirement cannot be circumvented by grafting evidence taken in a dependency proceeding onto the termination trial by certified copies of the record in the dependency case.

3. The trial court lacked "clear and convincing evidence."

The holding of the trial court is also erroneous because it was not based upon "clear and convincing evidence." The grounds upon which a finding of "abuse or neglect" may be based are set out in KRS 625.090(2). In determining whether one or more of the grounds exist, a trial court is required to consider six factors, which are set out in KRS 625.090(3).

In the present case, the family court determined that grounds existed under KRS 625.090(2)(e) and (g). In its review of the six factors, the family court found that the Cabinet rendered reasonable efforts to reunify the family. KRS 625.090(3)(c). Furthermore, the family court found that the Cabinet had met A.J.M.'s needs since

removal from T.G.'s custody and the prospects for improvement of A.J.M.'s welfare was greater if parental rights were terminated as her foster family wanted to adopt her. KRS 625.090(3)(e). Finally, the family court found that the Cabinet examined T.G.'s mental health. KRS 625.090(3)(a).

While there was testimony concerning T.G.'s mental illness, the statute provides that such mental illness must "render the parent consistently unable to care for the immediate and ongoing physical or psychological needs of the child for extended periods of time[.]" KRS 625.090(3)(a). However, the family court did not conclude or find that T.G.'s mental illness rendered her unable to consistently care for A.J.M.

In addition, psychologist Dr. Brenzel testified that T.G.'s diagnoses dramatically affect her ability to parent, but are manageable, and improvement is possible if she can form and maintain baseline relationships with the critical people in her life.

Mental health counselor Dr. Kinnetz noted the progress T.G. made during their 2004 sessions, but her mistrust and suspicions would not allow A.J.M. to be returned to her at that time. Neither of these witnesses testified that T.G.'s mental illness brought her within the scope of the statute.

As to reunification, the Cabinet did make efforts by providing parenting classes and therapy for T.G. However, T.G. completed what the Cabinet recommended, and much of what the Cabinet social worker Tange testified to took place prior to A.J.M.'s birth. Furthermore, the Cabinet did not offer in-home services to T.G. when social worker and

counselor Alison Johnson recommended these services for a successful reunification.

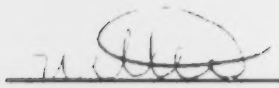
In sum, there was no substantial evidence that T.G. failed or was incapable of providing essential food, clothing, shelter or medical care. This was evident through the results of A.J.M.'s medical examination and testimony that she is above-average in both her intelligence and developmental levels. For this reason, the family court erred in finding otherwise.

Since there was no substantial evidence to support the family court's finding that A.J.M. was abused or neglected, or that a ground supporting termination exists, Petitioner submits that the family court clearly abused its discretion in terminating T.G.'s parental rights to A.J.M.

CONCLUSION

As shown above, the judgment of the court below was clearly erroneous and must be reversed. This Court, therefore, should grant certiorari to the Kentucky Supreme Court and, upon hearing, remand the action to the trial court with directions that the action be reinstated on the court's docket and that the Petitioner be granted a new trial. Petitioner prays for an Order of the Court so holding.

Respectfully submitted,



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APPENDIX

K.R.S. 625.090 Grounds for termination.

(1) The Circuit Court may involuntarily terminate all parental rights of a parent of a named child, if the Circuit Court finds from the pleadings and by clear and convincing evidence that:
(a) 1. The child has been adjudged to be an abused or neglected child, as defined in KRS 600.020(1), by a court of competent jurisdiction;
2. The child is found to be an abused or neglected child, as defined in KRS 600.020(1), by the Circuit Court in this proceeding; or
3. The parent has been convicted of a criminal charge relating to the physical or sexual abuse or neglect of any child and that physical or sexual abuse, neglect, or emotional injury to the child named in the present termination action is likely to occur if the parental rights are not terminated; and
(b) Termination would be in the best interest of the child.
(2) No termination of parental rights shall be ordered unless the Circuit Court also finds by clear and convincing evidence the existence of one (1) or more of the following grounds:
(a) That the parent has abandoned the child for a period of not less than ninety (90) days;
(b) That the parent has inflicted or allowed to be inflicted upon the child, by other than accidental means, serious physical injury;
(c) That the parent has continuously or repeatedly inflicted or allowed to be inflicted upon the child, by other than accidental means, physical injury or emotional harm;

(d) That the parent has been convicted of a felony that involved the infliction of serious physical injury to any child;

(e) That the parent, for a period of not less than six (6) months, has continuously or repeatedly failed or refused to provide or has been substantially incapable of providing essential parental care and protection for the child and that there is no reasonable expectation of improvement in parental care and protection, considering the age of the child;

(f) That the parent has caused or allowed the child to be sexually abused or exploited;

(g) That the parent, for reasons other than poverty alone, has continuously or repeatedly failed to provide or is incapable of providing essential food, clothing, shelter, medical care, or education reasonably necessary and available for the child's well-being and that there is no reasonable expectation of significant improvement in the parent's conduct in the immediately foreseeable future, considering the age of the child;

(h) That:

1. The parent's parental rights to another child have been involuntarily terminated;

2. The child named in the present termination action was born subsequent to or during the pendency of the previous termination; and

3. The conditions or factors which were the basis for the previous termination finding have not been corrected;

(i) That the parent has been convicted in a criminal proceeding of having caused or contributed to the death of another child as a result of physical or sexual abuse or neglect; or

(j) That the child has been in foster care under the responsibility of the cabinet for fifteen (15) of the most recent twenty-two (22) months preceding the filing of the petition to terminate parental rights.

(3) In determining the best interest of the child and the existence of a ground for termination, the Circuit Court shall consider the following factors:

(a) Mental illness as defined by KRS 202A.011(9), or mental retardation as defined by KRS 202B.010(9) of the parent as certified by a qualified mental health professional, which renders the parent consistently unable to care for the immediate and ongoing physical or psychological needs of the child for extended periods of time;

(b) Acts of abuse or neglect as defined in KRS 600.020(1) toward any child in the family;

(c) If the child has been placed with the cabinet, whether the cabinet has, prior to the filing of the petition made reasonable efforts as defined in KRS 620.020 to reunite the child with the parents unless one or more of the circumstances enumerated in KRS 610.127 for not requiring reasonable efforts have been substantiated in a written finding by the District Court;

(d) The efforts and adjustments the parent has made in his circumstances, conduct, or conditions to make it in the child's best interest to return him to his home within

a reasonable period of time, considering the age of the child;

(e) The physical, emotional, and mental health of the child and the prospects for the improvement of the child's welfare if termination is ordered; and

(f) The payment or the failure to pay a reasonable portion of substitute physical care and maintenance if financially able to do so.

(4) If the child has been placed with the cabinet, the parent may present testimony concerning the reunification services offered by the cabinet and whether additional services would be likely to bring about lasting parental adjustment enabling a return of the child to the parent.

(5) If the parent proves by a preponderance of the evidence that the child will not continue to be an abused or neglected child as defined in KRS 600.020(1) if returned to the parent the court in its discretion may determine not to terminate parental rights.

(6) Upon the conclusion of proof and argument of counsel, the Circuit Court shall enter findings of fact, conclusions of law, and a decision as to each parent-respondent within thirty (30) days either: Page 3 of 3

(a) Terminating the right of the parent; or
(b) Dismissing the petition and stating whether the child shall be returned to the parent or shall remain in the custody of the state.

CERTIFICATE OF COMPLIANCE WITH WORD COUNT LIMITATIONS

I, Theresa Gerstle, Petitioner and a *pro se* litigant, certify that the Petition for Rehearing filed in the above-entitled action contains 2,192 words, excluding the parts of the Petition that are exempted.

Dated: November 25, 2009

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CERTIFICATION OF COMPLIANCE
WITH SCR 44.2

I, Theresa Gerstle, Petitioner and a *pro se* litigant, certify that the Petition for Rehearing filed in the above-entitled action complies with the requirements of SCR 44.2, that it is limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented; that it is presented in good faith and not for delay.

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